

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

DESIREE ANN SHAW §
v. § CIVIL ACTION NO. 9:07cv146
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Desiree Shaw, proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of her conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

After review of the petition, the Magistrate Judge issued a Report on July 2, 2007, recommending that the petition be dismissed. The Magistrate Judge observed that this is the second habeas petition which Shaw filed concerning the same conviction, but that Shaw had failed to show that she had received permission from the Fifth Circuit Court of Appeals to file a successive petition. This previous petition was dismissed because the statute of limitations had expired, and on November 14, 2006, the Fifth Circuit affirmed this decision by denying Shaw a certificate of appealability.

Although Shaw maintained that the present petition was really a Rule 60(b) motion for reconsideration of the prior case, the Magistrate Judge concluded that this argument was incorrect because the petition raised matters beyond simply a challenge to the propriety of the district court's application of the statute of limitations in the earlier case. *See Gonzales v. Crosby*, 125 S.Ct. 2641,

2647-48.. The Magistrate Judge therefore recommended that Shaw's petition be dismissed without prejudice to her right to seek leave to file a successive petition.

Shaw filed objections to the Magistrate Judge's Report on July 11, 2007. In her objections, Shaw again refers to her petition as a Rule 60 motion, but does not dispute that she raised matters beyond the district court's application of the statute of limitations. She says that her previous petition was dismissed "on a technicality" rather than on the merits, and asks that the Court either stay her present petition and hold it in abeyance until she can obtain permission to file a successive petition.

As stated by the Magistrate Judge, Shaw raises issue sin the present case beyond a challenge to the application of the statute of limitations in her previous case, and so her contention that the present case is simply a Rule 60 petition is without merit. Shaw's request that the district court hold this case in abeyance is likewise without merit; the present case is a successive petition which was filed without permission from the Fifth Circuit, and so the Court lacks jurisdiction to consider it. Crone v. Cockrell, 324 F.3d 833, 838 (5th Cir. 2003). Her objections to the Report of the Magistrate Judge are without merit.

The Court has conducted a careful *de novo* review of the pleadings and documents in this cause, including the Petitioner's pleadings, the Report of the Magistrate Judge, the Petitioner's objections thereto, and all other pleadings, records, and documents in the case. Upon such *de novo* review, the Court has determined that the Report of the Magistrate Judge is correct and that the Petitioner[‘s objections are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus is DISMISSED without prejudice, with refiling subject to the petitioner's obtaining leave from the Fifth Circuit Court of Appeals to file a successive petition. It is further

ORDERED that the Petitioner Desiree Shaw is hereby DENIED a certificate of appealability *sua sponte*. The denial of a certificate of appealability shall have no effect upon the Petitioner's right to seek leave from the Fifth Circuit to file a successive petition. It is further

ORDERED that the Clerk shall send to the Petitioner Desiree Shaw, without charge, copies of: her original petition for the writ of habeas corpus in cause no. 9:05cv32 (docket no. 1); the brief in support of the original petition in cause no. 9:05cv32 (docket no. 2, part 1); the Memorandum Opinion and Order of Dismissal in cause no. 9:05cv32 (docket no. 70), and the final judgment in that case (docket no. 71). Should Shaw elect to file a motion for leave to file a successive petition with the Fifth Circuit, she may attach these copies to that motion. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 17 day of July, 2007.



Ron Clark, United States District Judge